Koubenec Motor Service, Inc. *and* Gale Q. Best, Jr.
Case 33-CA-4964

February 12, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On September 4, 1981, Administrative Law Judge Angelo G. Nicchitta issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, Respondent filed cross-exceptions and a supporting brief, and the General Counsel and Respondent filed answering briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In adopting the Administrative Law Judge's Decision we find it clear from his Decision as a whole and particularly from his findings that Gale Q. Best, Jr., was terminated for good cause and that this termination was not pretextual or in violation of the Act, that the Administrative Law Judge discredited the testimony of Gale Q. Best, Jr., and Susan Best that Respondent's secretary-treasurer, Cole, told them that Gale Q. Best, Jr., was being discharged because he was trying to form a union. Accordingly, we also agree with the dismissal of the allegation that Respondent independently violated Sec. 8(a)(1) of the Act by Cole's alleged statement.

Since Chairman Van de Water and Member Hunter agree with the Administrative Law Judge's finding that Respondent did not engage in unlawful conduct against Gale Q. Best, Jr., they find it unnecessary to pass on the Administrative Law Judge's general discussion of the independent contractor issue and his finding that Best was an employee of Respondent within the meaning of the Act.

DECISION

STATEMENT OF THE CASE

ANGELO G. NICCHITTA, Administrative Law Judge: This case was heard at Rockford, Illinois, on April 27, 1981, upon a complaint issued on September 12, 1980, which was subsequently amended at the hearing. The amended complaint alleges, in substance, that Respondent Koubenec Motor Service, Inc., discharged Gale Q. Best because the latter engaged in union or protected concerted activity and that Respondent took the latter action in order to discourage the employees from engaging in protected union and concerted activity.

Respondent defends on the ground that Gale Q. Best, Jr., was not an employee of Respondent during the period alleged in the complaint; that Gale Q. Best, Jr.'s relationship with Respondent during the period in question was that of a corporation and an independent contractor; that the National Labor Relations Board lacks authority under the National Labor Relations Act to entertain the charges asserted herein by a nonemployee or an independent contractor against a corporation; that Respondent never had any knowledge whatsoever of any union activities, either by or on behalf of Gale Q. Best, Jr.; and that any relationship that existed between Respondent and Gale Q. Best, Jr., was terminated unilaterally and voluntarily by Gale Q. Best, Jr.

The issues for adjudication in this proceeding are whether or not Gale Q. Best is an employee of Respondent within the meaning of Section 2(3) of the Act, whether or not Gale Q. Best was discharged by Respondent in violation of Section 8(a)(1) and (3) of the Act, and whether or not Respondent independently violated Section 8(a)(1) of the Act by restraining and coercing its employee Susan Best.

At the hearing, all parties were given full opportunity to be heard, to present evidence, and to make oral argument. Briefs have been filed by the General Counsel and Respondent.

Upon the entire record in the case, and upon my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Koubenec Motor Service, Inc., hereinafter called Respondent, is an Illinois corporation located in Huntley, Illinois. It operates as a motor common carrier, pursuant to certificates from the Interstate Commerce Commission, transporting various specified commodities over irregular routes in interstate or foreign commerce. It also operates in Illinois in intrastate commerce. Raymond Cole is Respondent's secretary/treasurer, a part owner, and one of its chief operating officers during the pertinent period herein.

Respondent derived gross revenues in excess of $50,000 from its interstate operations.

It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

A. *Respondent's Operations*

Respondent employs approximately 40 company drivers and 5 owner-operators. The status of the company drivers as Respondent's employees is not here in dispute.

Company drivers are paid between 24 and 26 percent of the revenues generated by the vehicle, less the fuel surcharge. Their health and hospitalization plan is paid for in its entirety by Respondent. While owner-operators can belong to Respondent's health and hospitalization program, the latter only provides administrative work and does not pay any premium payments for the owner-operators.

All owner-operators are required to enter into an equipment lease and broker agreement. Under the terms of the lease, Respondent has the exclusive and complete possession, use, and control of the owner-operator's vehicle during the 3-year term of the lease agreements. Under the lease, Respondent agrees to maintain, for the leased vehicle, the public liability insurance and the property damage insurance required by the Illinois Motor Carrier of Property Law. The lessor shall furnish liability and property damage insurance in the amount of $2 million and cargo insurance in the amount of $5,000. The lease further provides that Respondent, as lessee of the leased vehicle, assumes complete and full responsibility to the public, the shippers, and to all Federal regulatory bodies or authorities.

Under the terms of the broker agreement, owner-operators must make timely pickups and deliveries and must inform Respondent of any delays of 1 hour or more. Owner-operators are further required to report any problems with customers directly to its office and to maintain and keep all delivery receipts, logs, and trip sheets, all of which must be turned in to Respondent on a weekly basis. Owner-operators are also required to call into Respondent's facility promptly between 4:30 p.m. and 5:30 p.m. daily in order to receive the next day's work schedule. Additionally, Respondent requires that owner-operators maintain their vehicles and tires in good condition and that the leased vehicles be painted in Respondent's colors (when convenient).

Both company drivers and owner-operators are dispatched from Respondent's facility in essentially the same manner. Basically, all drivers are dispatched telephonically and Respondent relies on its knowledge of a driver's ability, skill, and dependability in determining which drivers are assigned to which loads. Owner-operators are expected to take all assigned runs and refusal could lead to disciplinary action by Respondent.

Company drivers are normally assigned specific highways and directions when making a run. Owner-operators are not assigned specific routes; however, specific routes are suggested and they are given specific delivery times which they are expected to meet.

Owner-operators are not allowed to "trip-lease" without first acquiring express permission from Respondent. Any owner-operator failing to acquire permission from Respondent prior to "trip-leasing" would be viewed by Respondent as having violated the terms of the lease agreement.

Respondent has the responsibility to insure that all of its drivers are in compliance with any applicable governmental regulations and company rules or policies. In this regard, Respondent has disciplined owner-operators for infractions of company rules or policies. Continuing in this vein, Respondent has the ultimate responsibility to insure that all drivers operating out of its terminal are qualified to do so. It checks the credentials and motor vehicle records of every driver operating out of its terminal.

All drivers operating out of Respondent's terminal are also required to have taken a road test and a physical exam prior to beginning their employment with Respondent. Respondent administers the road test to all of its company drivers and any owner-operators or driver of a vehicle leased to Respondent who has not taken the road test at the time he or she applies for employment with Respondent. Respondent also insures that identifying markings, required by the Federal government, are placed and maintained on all vehicles operating out of the Respondent's terminal under a lease agreement.

When a vehicle leased to Respondent is under dispatch from Respondent's terminal, the driver and cargo are covered by an insurance policy provided by Respondent at no expense to the drivers. While Respondent is required by law to maintain insurance on its drivers and cargo, Respondent's policy limits are maintained at a rate much higher than required by law.

Under the terms of the lease agreements entered into by Respondent and its owner-operators, the owner-operators are compensated on the basis of a percentage of the gross revenues generated from a given run or haul. That percentage ranges from 67.4 percent to 75 percent, depending on the type of equipment being leased to Respondent and the amount of administrative functions being performed by Respondent in connection with the lease.

Both company drivers and owner-operators are periodically provided with $300 cash advances by Respondent. The purpose of these advances is to provide drivers with cash to buy fuel, oil, pay tolls, or make needed repairs on their vehicles while they are on the road. Although Respondent maintains that it has no provisions or rules for making these advances to owner-operators, the record indicates that such advances have in fact been made by Respondent to owner-operators. Where cash advances are made to owner-operators prior to their leaving Respondent's terminal, no charges for bookkeeping or interest are levied against the owner-operator when Respondent subsequently retrieves the cash advanced from moneys which have subsequently become owing to the owner-operators in the form of earned income.

Both company drivers and owner-operators are allowed to charge gas and oil to Respondent's company accounts at various locations. Where owner-operators are concerned, Respondent is reimbursed for these expenditures by making deductions from the driver's pay. No charges for bookkeeping or interest are levied by Respondent. Owner-operators are also required to schedule their vacations 1 month in advance.

Company drivers are paid on a weekly basis. Respondent makes deductions from their checks for Federal income taxes, social security, state income taxes, and a health and hospitalization plan. Owner-operators are paid once a month and no deductions are made for Federal or state income taxes or social security. Respondent also

makes its maintenance facility available for a fee to owner-operators. In addition, Respondent orders repair and replacement parts for owner-operators which it sells to them at cost plus a small handling charge.

B. *Gale Q. Best's Employment by Respondent as a Company Driver*

Gale Best was employed by Respondent as a company driver on two separate occasions. His first period of employment with Respondent was from December 1978 to April 1979. The second period of employment was from May to September 1979. Best ended his first period of employment with the Respondent in April 1979 when he quit over a pay dispute. The pay dispute had to do with whether or not Best was entitled to additional compensation for unloading a trailer. Best took the position that he had been hired by Respondent as a driver at a certain rate or compensation and if Respondent wanted him to unload the trailers after the delivery was made then the Respondent should compensate him for the additional work. Respondent took the position that unloading was part of the job and if Best did not like it he could find another job.

Best ended his second period of employment with Respondent in September 1979 when he again quit over a pay dispute. Once again, the pay dispute concerned whether or not Best would be given additional compensation for loading and unloading trailers. Best discussed the problem with Richard Cole, who is Raymond Cole's brother and an officer of Respondent. Best's conversation with Richard Cole took place in Richard's office at Respondent's terminal. On reporting to work on September 24, 1979, Best had been told by the dispatcher that Richard Cole wanted to see him. Best and Richard met alone in Richard's office. Richard asked Best what his problem was and Best told him that he was again being required to load and unload trailers without being duly compensated. Richard told Best that he was not entitled to any additional compensation for loading and unloading. Richard then asked Best whether he was the person who had contacted the Interstate Commerce Commission back in April of that year and complained about having to unload trailers without being paid for it. Best admitted that he had contacted the ICC and he was then told by Richard that a person creating those kinds of disturbances would not be tolerated. When Richard attempted to extract a promise from Best that he would no longer engage in such conduct or make such inquiries, if he wanted to keep his job, Best told him that he could make no such promise. Best told Richard that if he felt he had a legitimate gripe or problem about pay that he would have to raise the questions. Best also said that he could not promise not to ask these questions and therefore he would have to quit.

C. *Gale Q. Best's Third and Final Period of Employment With Respondent*

During the last period of employment from December 1979 through March 1980, Best was a driver of his wife's tractor. The latter, Susan (Remus) Best was employed by Respondent from November 20, 1978, through July 10, 1980. Ms. Best worked in Respondent's office area where she rated freight bills, computed pay for the drivers, and performed other clerical functions. While employed by Respondent, Ms. Best, then Ms. Remus, met and began to date Gale Best. Gale and Susan Best were married on January 26, 1980. Sometime in the fall of 1979, Ms. Best purchased a truck and on December 1, 1979, she entered into a broker agreement and equipment lease agreement with Respondent. Prior to entering into these agreements with Respondent, both Gale and Susan Best met with Raymond Cole to discuss the financial feasibility and practicality of entering into a lease agreement with Respondent. At the time that these discussions took place, Gale and Susan were engaged to be married and Respondent knew that if it signed a lease agreement with Susan that Gale would be the exclusive driver. Since the vehicle to be leased by Respondent was purchased and registered in Susan's name, she alone executed the lease agreements with Respondent.

During the middle of February 1980, Gale Q. Best had a discussion with Raymond Cole at Respondent's facility. Best stated that only he and Cole were present during the conversation. Best questioned Cole with regard to whether or not Respondent was making certain deductions from the gross revenues generated by the vehicle prior to computing the moneys due and owing to the lessor of the vehicle. Cole told Best that he was being properly compensated which the latter accepted.

On March 15, 1980, another conversation ensued solely between Best and Cole. Best stated that the two men discussed whether or not Respondent was making certain deductions from gross revenues generated by Respondent's use of the vehicle leased to it by Susan (Remus) Best. Best questioned Cole about Respondent's methods of computing the amount of compensation due to the lessor under the lease agreement covering the vehicle driven by Best. He accused Respondent of making excessive deductions for washouts. Best stated he was called a liar by Cole and told that he was sticking his nose into areas where it did not belong. The conversation culminated in Cole telling Best that he was no longer wanted on the Respondent's premises, to get out, and further, that the truck he drove would no longer have a lease. Best left the premises.

On or about March 18, 1980, Susan Best received a phone call at home from Respondent's dispatcher, Jerry Wehrle. Wehrle told Susan Best that there was a load ready to go to Philadelphia and he asked her whether her truck would take it. The witness (Best) told Susan that in light of the fact that he had been fired, Susan had better talk to Raymond Cole and get the matter straigntened out before he would agree to take the load. Susan subsequently phoned Best from Respondent's facility, discussed the situation with him, and the latter agreed to take the load. Best took the load and the following morning he called in to the dispatcher to let him know where he was. During that phone call, Best spoke to Raymond Cole. Cole asked Best whether he had a driver lined up to start driving the truck after the following Friday. When Best asked Cole what he meant, the witness stated that Cole told him that Friday was the last

day he could drive the truck. Cole went on to say that the truck had a lease but that Best could no longer drive it. Cole further stated that if Best insisted on remaining as the primary driver, there would be no work for the vehicle. Best then responded that, under the circumstances, he and Susan had no choice but to "pull" the truck and find other work.

On or about March 22, 1980, after having returned from his last run for Respondent, Best had another conversation with Raymond Cole. This conversation took place in Richard Cole's office at Respondent's facility. Present during that conversation were Raymond Cole, Susan Best, and Gale Q. Best. Best asked Cole why he felt that he had the right to tell him that he could no longer drive the truck. Best brought up the question of what he felt to be excessive charges by Respondent for washouts. The method of computing compensation based upon taking a percentage of the gross revenues generated by a vehicle was also discussed. The conversation then returned to the question of Cole's justification for telling Best that there would be no more work for the truck he was driving. At that point, Gale Q. Best stated Cole told him, in the presence of his wife, that the real reason he was being fired was because he was trying to organize or start a union. In reply, Best told Cole that he had opposed a union organizing effort in June 1979 at Respondent's facility. Best stated that Cole replied by stating that he could bring in a number of drivers to prove that Best was trying to start a union. When Best challenged Cole to prove this allegation, he was told by Cole that it would be a waste of time and that he did not have the time.

II. DISCUSSION

The first issue to be determined is whether Gale Q. Best is an employee of the Respondent within the meaning of Section 2(3) of the Act.

In determining whether an individual is an employee or an independent contractor, the current legal standard is the "right to control" test adopted by the Board in *Deaton, Inc.*, 187 NLRB 780 (1971). The control test is traditionally stated in the following terms: "[The test focus on] the nature and the amount of control reserved by the person for whom the work is done. . . . [T]he employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished . . . [I]t is the right and not the exercise of control which is the determining element." *N.L.R.B.* v. *Phoenix Mutual Life Insurance Company*, 167 F.2d 983, 986 (7th Cir. 1948), cert. denied 335 U.S. 845.

In interstate truckline cases, an additional wrinkle on the control test has evolved. These are regulations by the Interstate Commerce Commission and the Department of Transportation. These regulations have the effect of requiring the holder of a certificate of public convenience and necessity to possess and exercise considerable control over trucks operated under the certificate without regard to whether the holder owns the trucks. Control over the trucks involves controls over the drivers.

In the present case, I have taken into account the substantial nexus of control required by Federal regulation and also found that the facts established the existence of "additional controls" voluntarily reserved by Respondent. *N.L.R.B.* v. *Pony Trucking, Inc.*, 486 F.2d 1039 (6th Cir. 1973). These "additional controls" and governmental controls, as established by the record include: (1) Respondent enjoys the exclusive possession, control, and use of the leased equipment; (2) the Respondent insures that identifying markings and insignia, required by the Federal government, are displayed on the vehicle that it leases; (3) Respondent requires owner-operators to accept virtually all assigned loads, and disciplines owner-operators who refuse assigned loads without just cause; (4) Respondent assigns loads with instructions on delivery times and requires the maintenance and submission of logsheets and other records; (5) Respondent requires drivers of leased equipment (like the company drivers who are admitted employees) to take physical examinations and road tests; (6) Respondent maintains cargo and liability insurance for owner-operators; (7) all drivers operating out of the Respondent's terminal, regardless of their classification, are subject to discipline for infraction of any company rule or policy; (8) where applicable, Respondent controls the allocation of loss due to cargo damage claims; (9) Respondent has made cash advances to owner-operators for operating expenses and deducted payments out of their paychecks without charging for bookkeeping or interest; (10) Respondent requires owner-operators to obtain permission before they trip lease; (11) Respondent requires that owner-operators maintain their vehicles and tires in good condition; and, (12) Respondent has the ultimate responsibility to insure that *all* of its drivers are in compliance with any applicable governmental regulations and company rules or policies.

In analyzing the aforementioned factors, I have considered the degree of control exercised over Respondent's owner-operators regardless of the reasons for the imposition of that control; that is, whether required by governmental regulations or inspired for other business reasons. *Robbins Motor Transportation, Incorporated, S.R.T. Motor Freight Inc.*, 225 NLRB 761 (1976).

It is my opinion, and I conclude, that Gale Q. Best is an employee within the meaning of Section 2(3) of the Act.

The next issue to be determined is whether Gale Q. Best was discharged upon Respondent's mistaken belief that he was trying to inform a union. The General Counsel's basis for finding that Best was discharged for the above-stated reason was a conversation between Best and Raymond Cole on or about March 22, 1980, witnessed by Ms. Best.

Raymond Cole had previously advised Best that his services were no longer acceptable, and on March 22, 1980, Best and Cole argued over the various problems that existed between the parties. According to Best and his wife, Cole allegedly stated that Best was no longer acceptable because he was attempting to form a union. Cole denied that he ever made such a statement and further stated that he had no knowledge of any union activities by or on behalf of Best.

In determining the credibility of the parties involved in the above-stated dialogue, I have taken into consideration other relevant factors in this proceeding.

The record shows that Best had previously been an employee of Respondent on two different occasions and both times had quit because of personal complaints and gripes with Raymond Cole and the management of Respondent. Cole had advised Susan Best not to purchase her truck because Koubenec did not need any additional help and because "it was very difficult times."

Best, as a company driver, refused to backhaul a load from a point in New Jersey and drove back empty. In March 1980, Best initially refused to haul a load of perishable bananas from Philadelphia and only agreed to take the freight upon the urging of his wife.

Since Respondent never requested Best to do anything different than requested of other drivers, the former did not believe that Best's complaints were legitimate.

There were adequate grounds for Best's dismissal. I find that Gale Q. Best's employment was terminated for good cause and that this termination was not pretextual or in violation of the Act.

Therefore, I shall recommend the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Gale Q. Best is an employee within the meaning of Section 2(3) of the Act.

2. The General Counsel has not established by a preponderance of the evidence that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act as alleged in the complaint.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[1]

The complaint is dismissed in its entirety.

[1] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.